JOINT APPENDIX

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-748

FRANK IREY, JR., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION, AND
JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION AND
JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

On Writs of Certiorari to
The United States Courts of Appeals
For the Third and Fifth Circuits

Petitions for Certiorari Filed November 21, 1975
Certiorari Granted March 22, 1976

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JOINT APPENDIX

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*The majority and dissenting opinions and judgment of the Court of Appeals for the Third Circuit *en banc* in No. 75-746 are printed at pp. 1a-25a of the Petition for Certiorari. The majority and dissenting opinions of the panel of the Third Circuit in No. 75-746 are printed at pp. 1b-26b of the Appendix to the Petition for Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit in No. 75-748 is printed at pp. 1a-27a of the Appendix to the Petition for Certiorari in that case. The orders and opinions of the Occupational Safety and Health Review Commission in each case are reprinted as appendices to the respective petitions for certiorari in each case.

CHRONOLOGICAL LIST OF RELEVANT DOCKET FNTRIFS DOCKET NUMBER 75-746

6/15/72	Secretary's citation for serious violation, issued
6/15/72	Secretary's notification of proposed penalty, dated
7/10/72	Employer's notice of contest, received
7/17/72	Secretary's complaint, received
7/24/72	Employer's answer to complaint, received
8/30/73	Employer's demand for jury trial and procedural due process, dated
8/30/72	Employer's motion to dismiss, dated
9/7/72	Hearing Judge Brady's Order denying demand for jury trial and motion to dismiss, dated
11/2/72	Hearing opened
11/2/72	Hearing closed
4/5/73	Hearing Judge Brady's decision, received
4/30/73	Employer's petition for discretionary review, received
5/8/73	Commission final order, dated
6/4/73	Petition for Review of the Order of the Occupational Safety and Health Review Commission, filed in Court of Appeals for the Fifth Circuit, filed
9/8/75	Opinion and Judgment of the Court of Appeals, filed

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES DOCKET NO. 75-748

3/22/72	Secretary's Citation for serious violation, issued
3/22/72	Secretary's Notification of proposed penalties, dated
3/28/72	Employer's Notice of Contest, dated
4/12/72	Secretary's Complaint, received
4/14/72	Employer's Answer, dated
6/12/72	Hearing opened
6/17/72	Oral Motion to Dismiss for unconstitutionality of enforcement procedures
6/27/72	Hearing closed
11/13/72	Administrative Law Judge's Decision & Order, dated
12/14/72	Chairman Moran's Direction for Review, dated
8/1/73	Commission's Decision, dated
9/7/73	Petition for Review of Order of the Occupational Safety and Health Review Commission, filed in Court of Appeals for Third Circuit
9/28/73	Amended Petition for Review to include United States Dept. of Labor as additional Respondent, filed
11/4/74	Opinion and Judgment of the Court of Appeals, filed
12/20/74	Order granting Petition for Rehearing and directing the Clerk to list case for rehearing before the Court en banc, filed
7/24/75	Opinion and Judgment of the Court of Appeals on Rehearing, filed

March 29, 1976

Mr. Ken Geller
Office of the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission, et al.; No. 75-748; Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, et al.; No. 75-746

Dear Mr. Geller:

In accordance with our recent telephone conversation and Supreme Court Rule 36, the Petitioners in the above styled consolidated cases designate, in addition to the documents printed as an appendix to their respective Petitions for Certiorari, the following for inclusion in the single joint appendix:

1. Certified list of relevant docket entries (Docket No. 75-748);

2. Citation for serious violation, dated March 22, 1972 (Docket No. 75-748);

3. Complaint, received April 12, 1972 (Docket No. 75-748);

4. Employer's Answer, dated April 14, 1972 (Docket No. 75-748);

5. United States Supreme Court Order granting Petition for Certiorari, dated March 22, 1976 (Docket No. 75-748);

6. Certified list of relevant docket entries (Docket No. 75-746);

7. Citation for serious violation, dated June 15, 1972 (Docket No. 75-746);

8. Complaint, received July 17, 1972 (Docket No. 75-746);

9. Employer's Answer, dated July 20, 1972 (Docket No. 75-746);

10. United States Supreme Court Order granting Petition for Certiorari, dated March 22, 1976 (Docket No. 75-746).

The issue which Petitioners intend to present for review in these consolidated cases is question No. 2 in the Petition for Certiorari, as follows:

> Assuming that the administrative enforcement procedures set up by the Occupational Safety and Health Act of 1970 for the imposition of civil penalties are civil in nature and effect, whether such procedures deny the defendant employers' right to jury trial guaranteed by the Seventh Amendment to the Constitution.

Your response to this designation as soon as possible will be appreciated.

Very truly yours,

STOKES & SHAPIRO

Ira J. Smotherman, Jr.
for McNeill Stokes

IJS,Jr/pc

cc: Mr. Michael Levin
Mr. Michael Rodak, Jr.
Mr. William S. McLaughlin
Mr. Martin D. Minsker
Mr. Oliver N. Hormel

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
1000 Liberty Avenue, Room 445D
Pittsburgh, Pa. 15222

Secretary's Citation for Alleged Serious Violation, Dated March 22, 1972.

CSHO NO.	OSHA I NO.
0-9819	4
AREA	REGION
6600	3

CITATION FOR SERIOUS VIOLATION*

Citation Number 1 Date Issued March 22, 1972

EMPLOYER Frank Irey Jr., Inc.

ADDRESS (Street Park Avenue Extension, R. D. #2

(City Monongahela State Pennsylvania Zip 15063

An inspection of a workplace under your ownership, operation, or control located at Evansdale Campus, West Virginia University, Morgantown, West Virginia and described as follows Station 8 + 00 Main Guide Creative Arts and Engineering Building has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 C.F.R. Section 1926.652(b) (formerly 29 C.F.R. Section 1518.652(b)), as adopted by 29 C.F.R. Section 1910.12	On January 11, 1972, at the above work site, Frank Irey Jr., Inc. willfully violated the aforesaid standard by failing to shore, sheet, brace, slope or otherwise support by means of sufficient strength to protect employees working within them, the sides of a trench approximately 3 feet wide, 35 feet long and 7½ feet deep.	Immediately

Area Director's Signature Harry G. Jacobs

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U. S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

Form OSHA-
AUG. 1971

BEST COPY AVAILABLE

6a

7a

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
1000 Liberty Avenue, Room 445D
Pittsburgh, Pa. 15222

CSHO NO.	OSHA NO.
0-9819	4
AREA	REGION
6600	3

CITATION FOR SERIOUS VIOLATION*

Citation Number 2 Date Issued March 22, 1972

EMPLOYER Frank Irey Jr., Inc.

ADDRESS (Street Park Avenue Extension, R. D. #2

(City Monongahela State Pennsylvania Zip 15063

An inspection of a workplace under your ownership, operation, or control located at Evansdale Campus, West Virginia University, Morgantown, West Virginia and described as follows Station 8 + 00 Main Guide Creative Arts and Engineering Building has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 C.F.R. Section 1926.651(h) and 29 C.F.R. Section 1926.652 (h) (formerly 29 C.F.R. Section 1518.651(h) and 29 C.F.R. Section 1518.652(h)), as adopted by 29 C.F.R. 1910.12	On January 11, 1972, at the above work site, Frank Irey Jr., Inc. stored excavated material nearer than 4 feet from the edge of a trench excavation (excavated material was piled immediately adjacent to trench); no ladder was provided in trench more than 3 feet deep, where employees were required to be in trench (trench was approximately 3 feet wide, 35 feet long and 7½ feet deep).	Immediately

Area Director's Signature Harry G. Lacy JKES

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

Form OSHA 2

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
Secretary's Notification of Proposed Penalty,
Dated March 22, 1972.
NOTIFICATION OF PROPOSED PENALTY

CSHO NO.	OSHA I NO.
0-9919	4
AREA	REGION
6600	3

TO: Frank Irey Jr., Inc.
Park Avenue Extension, R. D. #2
Monongahela, Pennsylvania 15063

On the 22nd day of March, 1972, 1 Citation(s) /~~1~~/ (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 91; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below /~~#~~/ are being proposed, based on the above Citation(s):

SERIOUS VIOLATIONS

Citation No.		Proposed Penalty
1.	29 C.F.R. 1926.652(b)	$7,500.00
2.	29 C.F.R. 1926.651(h)	$ 800.00

OTHER VIOLATIONS*

Citation No.	Item No.		Proposed Penalty
1	1.	29 C.F.R. 1926.401(f)	$ 80.00
1	2.	29 C.F.R. 1926.150(c)(1)(vii)	0
1	3.	29 C.F.R. 1926.350(a)(1)	$ 45.00
1	4.	29 C.F.R. 1926.51(c)	$ 55.00
1	5.	29 C.F.R. 1926.51(a)(1)	$ 55.00

Total for All Alleged Violations $8,535.00

* In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

(Continued on reverse side)

Form OSHA-3

BEST COPY AVAILABLE

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The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, unless, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

Dated at Pittsburgh, Pennsylvania this 22nd day of March, 19 72.

Harry G. Lacey Jr.

Area Director
Occupational Safety and Health Administration
U.S. Department of Labor
1000 Liberty Avenue, Room 445D Federal Bldg.
Pittsburgh, Pennsylvania 15222

BEST COPY AVAILABLE

GPO 810-616

Form OSHA-3
Aug. 1971

Secretary's Complaint, Received April 12, 1972.

COMPLAINT.

Petitioner, James D. Hodgson, Secretary of Labor, United States Department of Labor, brings this proceeding to enforce the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U. S. C. 651, *et seq.*), hereinafter referred to as the Act, seeking to have affirmed by the Occupational Safety and Health Review Commission, certain Citations and Proposed Penalties assessed against the respondent, Frank Irey, Jr., Inc., a corporation, for alleged violations of section 5(a) (2) of the Act, and the Safety and Health Regulations for construction promulgated thereunder, as found in 29 C. F. R. 1518 and adopted pursuant to section 4(b) (2) of the Act by regulations issued thereunder, as found in 29 C. F. R. 1910.12 as Safety and Health Regulations under the Act and redesignated as Part 1926.

I.

Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) (29 U. S. C. 661(c)) of the Act.

II.

Respondent, Frank Irey, Jr., Inc., is a Pennsylvania corporation maintaining its principal office at Park Avenue Extension, R. D. No. 2, Monongahela, Pennsylvania, and also maintaining a work site at R. D. No. 2, Box 7, Evansdale Campus, West Virginia University, Morgantown, West Virginia, and is and at all times hereinafter mentioned was, a general contractor engaged in various construction activities both in the Commonwealth of Pennsylvania and in the state of West Virginia, and is an employer engaged in a business af-

fecting commerce who has employees as defined by section 3(5) of the Act and is subject to the requirements of the Act and the regulations issued or promulgated thereunder.

III.

An inspection of the respondent's work place, a site for excavation located at the Evansdale Campus, West Virginia University, Morgantown, West Virginia, Station 8+ 00, Main Guide Creative Arts & Engineering Building, was conducted by Compliance Safety and Health Officers of the Occupational Safety and Health Administration, Pittsburgh Area, on January 14, 1972. As a result of this investigation, the respondent was issued by certified mail on March 22, 1972, one Citation for Serious Violation (Willful), one Citation for Serious Violation, and one Citation containing five items, all of which were issued pursuant to section 9(a) of the Act.

To the extent that this Complaint is, or may be inconsistent with the aforesaid Citations and penalties proposed thereon, the said Citations and Proposed Penalties should be deemed to be amended accordingly.

IV.

Citation for Serious Violation (Willful)

On January 11, 1972, respondent willfully violated 29 C. F. R. 1926.652(b) by failing to shore, sheet, brace, slope or otherwise support by means of sufficient strength, the sides of a trench located at the aforementioned work site. An immediate abatement date was fixed, and pursuant to section 17(a) of the Act, a penalty of $7,500 was proposed.

Citation for Serious Violation

a. On January 11, 1972, respondent violated 29 C. F. R. 1926.651(h) which requires that excavated or other material

shall not be stored nearer than four feet from the edge of any excavation, and shall be so stored and retained as to prevent its falling or sliding in to the excavation. This standard was violated in that respondent stored excavated material nearer than 4 feet from the edge of the aforesaid trench excavation.

b. On January 11, 1972 respondent violated 29 C. F. R. 1926.652(h) which requires that where employees are required to be in trenches three feet deep or more, ladders extending from the floor of the trench excavation to at least three feet above the top of the excavation shall be provided and so located as to provide means of exit without more than 25' of lateral travel. This standard was violated in that no ladder was provided in the aforesaid trench although the said trench was more than 3 feet deep and employees were required to be in the said trench.

An immediate abatement date was fixed for items a and b above, and a penalty of $800 was proposed pursuant to section 17(b) of the Act.

Citation

a. Item No. 1—On January 11, 1972 respondent violated 29 C. F. R. 1926.401(f) which requires that extension cords used with portable electric tools and appliances shall be of the three wire type. This standard was violated in that an extension cord used with a fuel tank pump was not of the three wire type. An abatement date of March 27, 1972 was fixed, and pursuant to section 17(c) of the Act, a penalty of $80 was proposed.

b. Item No. 2—On January 11, 1972 respondent violated 29 C. F. R. 1926.150(c)(1)(vii) which requires that portable fire extinguishers shall be inspected periodically and maintained in accordance with Maintenance and Use of Portable

Fire Extinguishers NFPA No. 10-A-70. This standard was violated in that a fire extinguisher in the oil storage and equipment trailer had no maintenance record tag or record of inspection. An abatement date of March 27, 1972 was fixed and no penalty was proposed.

c. Item No. 3—On January 11, 1972 respondent violated 29 C. F. R. 1926.350(a)(1) which requires that when transporting, moving and storing compressed gas cylinders, valve protection caps shall be in place and secured. This standard was violated in that several gas cylinders in the cylinder storage area had no valve protection caps in place. An immediate abatement date was fixed and pursuant to section 17(c) of the Act, a penalty of $45 was proposed.

d. Item No. 4—On January 11, 1972 respondent violated 29 C. F. R. 1926.51(c) which requires that toilets shall be provided for employees. This standard was violated in that no toilets were provided. An abatement date of March 29, 1972 was fixed and pursuant to section 17(c) of the Act, a penalty of $55 was proposed.

e. Item No. 5—On January 11, 1972 respondent violated 29 C. F. R. 1926.51(a)(1) which requires that an adequate supply of potable water shall be provided in all places of employment. This standard was violated in that no potable water was provided at the place of employment. An abatement date of March 27, 1972 was fixed and pursuant to section 17(c) of the Act, a penalty of $55 was proposed.

Secretary's Complaint, Received April 12, 1972.

V.

The proposed penalties and abatement dates as previously mentioned herein were reasonable and proper in that due consideration was given to the gravity of the violations, the size of the respondent, the good faith of the respondent and its history of previous violations as required by section 17(j) of the Act.

VI.

Respondent by letter dated March 28, 1972, signed by Paul A. Simmons, Esquire, counsel for the respondent, notified the petitioner of its intention to contest the citations and penalties. Said notice was received by the Area Director, Pittsburgh, Occupational Safety and Health Administration on March 31, 1972. The notice of contest was forwarded to the Occupational Safety and Health Review Commission on March 31, 1972.

VII.

Respondent employs approximately 100 employees, and those employees at the work site affected by the aforesaid violations are represented by District 50, Allied Technical Workers of the United States and Canada, 4880 McArthur Blvd., N. W., Washington, D. C.

WHEREFORE, cause having been shown, petitioner demands that the aforesaid Citations be affirmed and that the Commission affirm the aforesaid penalties or in the alternative, assess penalties for the aforesaid violations in an amount not less than that proposed by the Area Director,

Secretary's Complaint, Received April 12, 1972.

Pittsburgh Area Office, Occupational Safety and Health Administration.

Post Office Address:

Mr. Louis Weiner
U. S. Department of Labor
1505 Jefferson Bldg.
1015 Chestnut St.
Phila., Pa. 19107

RICHARD F. SCHUBERT,
Solicitor of Labor.

LOUIS WEINER,
Regional Solicitor.

STEPHEN K. ERNST,
Attorney.

UNITED STATES DEPARTMENT
OF LABOR,
Attorneys for Petitioner.

MARVIN TINCHER,
Regional Attorney,
Nashville, Tennessee,
Region X.

CERTIFICATE OF SERVICE.

I, Stephen K. Ernst, hereby certify that I served a Complaint, by mailing true copies thereof in Government en-

Secretary's Complaint, Received April 12, 1972.

velopes, postage prepaid, by certified mail, return receipt requested on the below:

Certified No. 672287
Frank Irey, Jr., Inc.
Park Avenue Extension
R. D. No. 2
Monongahela, Pa. 15063

Certified No. 672288
Paul A. Simons, Esq.
Hormell, Tempest, Simmons,
Bigi & Melenyzer
Second & Chess Streets
Monongahela, Pa. 15063

Certified No. 672289
Pres. District 50
Allied Technical Workers
of the U. S. & Canada
4880 McArthur Blvd., N. W.
Washington, D. C. 20007

Certified No. 672290
Miss Carole A. Betterley
Executive Secretary
Occupational Safety and Health
Review Commission
1825 K. Street, N. W.
Washington, D. C. 20006

STEPHEN K. ERNST,
United States Department of Labor
One of the Attorneys for Petitioner.

Employer's Answer, Dated April 14, 1972.

ANSWER TO COMPLAINT.

Respondent, Frank Irey, Jr., Inc., answers to Complaint in the above captioned case as follows:

1. Paragraph number one of said Complaint is admitted.

2. Paragraph number two of said Complaint is admitted.

3. Paragraph number three of said Complaint is admitted, but it is denied that any of the citations referred therein were wilful, and/or serious.

Employer's Answer, Dated April 14, 1972.

4. (Citation for Serious Violation (Wilful)) The first sentence of Paragraph Number four of said Complaint is denied that on January 11, 1972, Respondent wilfully violated 29 C. F. R. 1926.652 (b) by failing to shore, sheet, brace, slope or otherwise support by means of sufficient strength, the sides of a trench located at the aforementioned work site. As to the second sentence in Paragraph Number four of said Complaint, the same is admitted.

4a. (Citation for Serious Violation) As to Paragraph 4a. of said Complaint, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926. 651(h), and on the contrary, it is averred that all excavated material and other material was properly stored.

4b. As to Paragraph 4b. of said Complaint, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926.652(h), and on the contrary it is averred that all standards required by law were not violated.

4. (Citation) (Page No. 4 of Complaint)

a. In answer to a. Item No. 1, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 126.401(f), and further, it is denied that the extension cords referred to in said paragraph was not in the proper type.

b. In answer to b. Item No. 2, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926 C. F. R. 1926.150(c) (1) (vii), and on the contrary it is averred that portable fire extinguishers were inspected and maintained in accordance with the proper standards.

c. In answer to c. Item No. 3, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926.350(a) (1), and on the contrary it is averred that proper valve protection caps were on all compressed gas cylinders when the same were transported and/or moved or stored.

Employer's Answer, Dated April 14, 1972.

d. In answer to d. Item No. 4, it is denied that on January 11, 1972, respondent violated 29 C. F. R. 1926.51(c), and on the contrary it is averred that proper toilets were provided.

e. In answer to e. Item No. 5, it is denied that on January 11, 1972, Respondent violated 29 C. F. R. 1926.51(a) (1), and on the contrary it is averred that an adequate supply of water was provided at the place of employment.

5. Paragraph Number five of said Complaint is denied that the proposed penalties and abatement dates as previously mentioned herein were reasonable and proper in that due consideration was given to the gravity of the violations, the size of the respondent, the good faith of the respondent and its history of previous violations as required by Section 17(j) of the act, and on the contrary, the proposed penalties under all of the circumstances were unreasonable and improper.

6. Paragraph Number six of said Complaint is admitted.

7. Paragraph Number seven of said Complaint is admitted.

WHEREFORE, Respondent demands that the aforesaid Citations be dismissed, and in the alternative, that the penalties assessed should be substantially reduced under the circumstances.

HORMELL, TEMPEST, SIMMONS,
BIGI & MELENYZER,
By Paul A. Simmons,
Attorney for Frank Irey, Jr.,
Inc., Respondent.

20a

Employer's Answer, Dated April 14, 1972.

CERTIFICATE OF SERVICE.

I, PAUL A. SIMMONS, hereby certify that I have served Answers to the Complaint, by mailing true copies thereof, postage prepaid, by certified mail, return receipt requested on the below:

Pres. District 50
Allied Technical Workers
of the U. S. & Canada
4880 McArthur Bldg., N. W.
Washington, D. C. 20007
Certified No. 754008

Marvin Tincher
Regional Attorney
725 U. S. Courthouse
801 Broadway
Nashville, Tennessee 37203
Certified No. 705284

PAUL A. SIMMONS,
Attorney for Frank Irey, Jr., Inc., Respondent.

Sworn to and subscribed before
me this 14th day of April, 1972.
Carmen M. DiGiovanni,
Notary Public,
Monongahela, Washington Co.,
My Commission Expires July 7, 1975.

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U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CSHO NO.	CASE NO.
M-8790	72-7
AREA	REGION
0870	4

CITATION FOR SERIOUS VIOLATION*

Citation Number One, Page 1 of 1 Date Issued June 15, 1972

EMPLOYER Atlas Roofing Company, Inc.

ADDRESS (Street Moreland Avenue, #42 Highway
P.O. Box 18211, E. Atlanta Station
(City Atlanta State Georgia Zip 30316

An inspection of a workplace under your ownership, operation, or control located at Granite Road, Arrowood Industrial Park, Charlotte, North Carolina and described as follows Construction project Jabco #4 warehouse has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects:

Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
29 CFR Sec 1926.500(b)(4) (formerly 29 CFR Sec 1518.500(b)(4) as adopted by 29 CFR Sec 1910.12.	Failure to provide and maintain a cover, or to provide a fixed standard railing on all exposed sides, for openings in roof, as the 3' x 3' opening in #3 bay of Jabco Warehouse #4.	Immediately

The above condition existed on June 6, 1972.

Area Director's Signature Preston F. Hawkins

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U. S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

26a

27a

U... DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CSHO NO.	OSHA-1 NO.
M-8799	72-7
AREA	REGION
0870	4

NOTIFICATION OF PROPOSED PENALTY

TO: Atlas Roofing Company, Inc.
P.O. Box 18211, E. Atlanta Station
Atlanta, Georgia 30316

On the Fifteenth day of June, 1972, a Citation(s) was (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below is/are being proposed, based on the above Citation(s):

SERIOUS VIOLATIONS

Citation No.	Proposed Penalty
ONE	$600

28a

OTHER VIOLATIONS*

Citation No.	Item No.	Proposed Penalty
		NONE

29a

Total for All Alleged Violations $600

* In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

(Continued on reverse)

The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, unless, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

Dated at CHARLOTTE, NORTH CAROLINA this FIFTEENTH day of JUNE, 1972.

QUINTON F. HASKINS

Area Director
Occupational Safety and Health Administration
U.S. Department of Labor
1361 E. Morehead Street
Charlotte, North Carolina 28204

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,	)	
	)	OSHRC Docket
v.	)	No. 1130
ATLAS ROOFING COMPANY, INC.	)	
Respondent.	)	**COMPLAINT**

Inspection has disclosed that, at the times and in the manner hereinafter stated, the provisions of section 5(a)(2) of the Occupational Safety and Health Act of 1970 (84 Stat. 1604; 29 U.S.C. 651, *et seq.*), hereinafter referred to as the Act, and Occupational Safety and Health Standards promulgated pursuant to section 6 thereof (29 CFR Part 1910) have been violated. It is, therefore, averred and charged that:

I

Jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

II

Respondent, Atlas Roofing Company, Inc., is a corporation having a place of business and doing business at Moreland Avenue, #42 Highway and various

construction sites where it is engaged in roofing construction. Respondent is and at all times hereinafter mentioned has been an employer engaged in a business affecting commerce within the meaning of the Act.

III

As a result of inspection by an authorized representative of the Secretary of Labor, one citation was issued to respondent on June 15, 1972, pursuant to section 9(a) of the Act.

To the extent that this complaint may be inconsistent with the citation and proposed penalty issued in this proceeding, the citation and proposed penalty are deemed to be amended accordingly.

IV

The Citation for Serious Violation, 29 CFR § 1926.500(b)(4), is hereby amended by changing 29 CFR § 1926.500(b)(4) to 29 CFR § 1926.500(b)(1) so that it is alleged on or about June 6, 1972, respondent violated 29 CFR § 1926.500(b)(1) [formerly 29 CFR § 1518.500(b)(1)] in that respondent failed to provide and maintain a cover or to provide a standard railing on all exposed sides for openings in the roof at #3 bay of Jabco Warehouse #4 under construction at Arrowood Industrial Park, Charlotte, North Carolina.

V

The violation alleged in paragraph IV above was a serious violation within the meaning of section 17(k) of

the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist, and respondent knew, or could with the exercise of reasonable diligence have known, of the presence of the violation.

VI

On June 15, 1972, notification fixing an abatement date and proposed penalty was mailed to respondent. The abatement date fixed and penalty proposed with respect to the violation alleged in paragraph IV above are Immediately and $600.00, respectively. The aforesaid abatement date was and is reasonable. In determining the amount of the proposed penalty, due consideration was given to the size of the business of the respondent, the gravity of the violation, the good faith of the employer and the history of previous violations as required under section 17(j) of the Act.

VII

On or about July 7, 1972, by letter dated July 5, 1972, respondent filed with the Secretary a notification of intent to contest the aforesaid citation and proposed assessment of penalty pursuant to the provisions of section 10(c) of the Act. Said notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission.

VIII

(A) Employees of respondent affected by the violation described in paragraph IV above number

approximately seven (7) and include roofers and laborers.

(B) Said employees are not represented by a certified bargaining representative.

WHEREFORE, the aforesaid citation, penalty and abatement date should be affirmed.

POST OFFICE ADDRESS:

Mr. Beverley R. Worrell
Office of the Solicitor
U.S. Department of Labor
Room 339
1371 Peachtree St., N.E.
Atlanta, Georgia 30309

Telephone: 404-526-5811

/s/ Richard F. Schubert
Richard F. Schubert
Solicitor of Labor
/s/ Beverley R. Worrell
Beverley R. Worrell
Regional Solicitor

/s/ Joan M. Hollenbach
Joan M. Hollenbach
Attorney

/s/ Roger J. Martinson
Roger J. Martinson
Attorney

Attorneys for James D. Hodgson, Secretary of Labor, United States Department of Labor.

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
RECEIVED
JUL 17 1972
Office of the Executive Secretary

CERTIFICATE OF SERVICE

I certify that the foregoing complaint was served on this 14th day of July, 1972, by mailing true copies thereof by certified mail, return receipt requested, to Mr. McNeill Stokes, Attorney for Respondent, at 3015 First National Bank Tower, Atlanta, Georgia 30303.

/s/ Roger J. Martinson
Roger J. Martinson
Attorney

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
RECEIVED
JUL 17 1972
Office of the Executive Secretary

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,	)	
v.	)	OSHRC Docket No. 1130
ATLAS ROOFING COMPANY, INC.,	)	
Respondent,	)	**ANSWER**

Comes now ATLAS ROOFING COMPANY, INC., hereinafter sometimes referred to as "Atlas", and files this Answer without waiving its jurisdictional defenses, hereinafter set forth, as follows:

FIRST DEFENSE

1.

The allegation of paragraph I of the Complaint is denied.

2.

The allegations of paragraph II are denied, except that the Respondent, Atlas, is a corporation having a place of business and doing business at Moreland Avenue, #42 Highway and various construction sites where it is engaged in roofing construction.

3.

The allegations of paragraph III are denied, except that one citation was issued to Respondent, Atlas, on June 15, 1972.

4.

The allegations of paragraph IV are denied.

5.

The allegations of paragraph V are denied.

6.

The allegations of paragraph VI are denied, except that on June 15, 1972, notification fixing an abatement date and proposed penalty was mailed to Respondent.

7.

The allegations of paragraph VII are admitted.

8.

The allegations of paragraph VIII(A) are denied.

9.

The allegation of paragraph VIII(B) is admitted.

SECOND DEFENSE

The Respondent is not subject to the jurisdiction of the Occupational Safety and Health Review Commission or the provisions of the Occupational Safety and Health Act of 1970.

THIRD DEFENSE

The Occupational Safety and Health Act of 1970, and its enforcement procedures are invalid and unconstitutional.

FOURTH DEFENSE

The standards alleged to have been violated are invalid and did not apply to work performed on roofing and did not apply to the Respondent.

FIFTH DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

WHEREFORE, having fully answered, Atlas Roofing Company, Inc. prays that the Complaint be dismissed with all costs cast upon the complaintant.

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
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JUL 24 1972
Office of the Executive Secretary

STOKES, BOYD & SHAPIRO

By: /s/ McNeill Stokes
McNeill Stokes
Attorney for Atlas Roofing
Company, Inc.

3015 First National Bank Tower
Atlanta, Georgia 30303
(404) 577-3671

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Answer of Atlas Roofing Company, Inc., Respondent, has been posted in a conspicuous place where employees can see it at JABCO Number 4 Warehouse, Granite Road, Arrowhead Industrial Park, Charlotte, North Carolina, and that I have served a copy of the foregoing Answer on the below-listed parties by Certified Mail, Return Receipt Requested, properly addressed and with sufficient postage thereon:

Mr. Beverly R. Worrell
Office of the Solicitor
U.S. Department of Labor
Room 339
1371 Peachtree Street, N.E.
Atlanta, Georgia 30309

Occupational Safety and Health
Review Commission
1825 "K" Street, N.W.
Washington, D.C. 20006

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
RECEIVED
JUL 24 1972
Office of the Executive Secretary

This 20th day of July, 1972.

STOKES, BOYD & SHAPIRO

By: /s/ McNeill Stokes
McNeill Stokes
Attorney for Atlas Roofing
Company, Inc.

3015 First National Bank Tower
Atlanta, Georgia 30303
(404) 577-3671

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 22, 1976

McNeill Stokes, Esq.
3920 First National Bank Tower
Atlanta, Georgia 30303

RE: Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission et al., No. 75-746; and Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission et al., No. 75-748

Dear Mr. Stokes:

The Court today took the following action in the above cases:

"The petitions for writs of certiorari are granted limited to Question 2 presented by the petitions which read as follows:

'2. Assuming *arguendo* that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution.'

"The cases are consolidated and a total of one hour is allotted for oral argument."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable in each of these cases.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ June M. Hoffmann/c
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures